91-1562

No. _____

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In The Supreme Court of the United States October Term, 1991

JEWEL FOOD STORES,
a Division of Jewel Companies, Inc.
Petitioner,

v.

KELLY MERK, et al.,
Respondents,

v.

UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 881,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In an action under Section 301 of the Labor-Management Relations Act, does federal law invalidate an oral understanding that was a key component of a collective bargaining agreement, because that understanding was not disclosed during the membership ratification process?

2. In an action under Section 301 of the Labor-Management Relations Act, alleging defects in the union's ratification process, may the court invalidate an oral understanding that would have conferred a substantial benefit on the employer and that was a crucial component of a collective bargaining agreement, while enforcing other provisions of that agreement against the employer?

3. May a court of appeals overturn a judgment based upon a jury verdict without determining, on the basis of the record, that no rational jury could have reached that verdict?

4. Where a union is pressing a grievance on behalf of an entire bargaining unit, does the termination of employment of some members of that unit during the pendency of the grievance extinguish the union's duty of fair representation to them, and may they maintain a breach of contract action under Section 301 solely against their former employer despite a settlement of the grievance reached by the union and the employer?

5. In a Section 301 action seeking to invalidate a key oral portion of a collective bargaining agreement on grounds that the means adopted by the parties to form the agreement were improper, do the principles of *Del Costello* require the application of a federal six-month limitations period rather than a state's statute of limitations for breach of contract actions?

LIST OF PARTIES

The parties to the proceedings below and in this Court are Petitioner Jewel Food Stores, a division of Jewel Companies, Inc. ("Jewel") (American Stores Company is the parent corporation of Jewel); Respondents Kelly Merk, Joseph Staszewski, Vicki Menagh, Donna McCormick, David Therkield, John Malone, Marlene Wagner, Michael DeMare, Wayne Volker, Eleanore Collins, Andrew Kachik, and Patricia Todd (all of whom purport to represent a certified class of certain union employees who left Jewel's employment during a specified period) ("Respondents" or "Plaintiffs"); and Respondent United Food Commercial Workers International Union, AFL-CIO, Local 881 ("Local 881" or "Union").

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OPINIONS BELOW

Petitioner seeks review of two decisions of the Court of Appeals. One is reported at 848 F.2d 761 (7th Cir. 1988) ("*Merk I*") (Appendix A, pp A-1 to A-13); the District Court's opinion is reported at 641 F.Supp. 1024 (N.D. Ill. 1986) (Appendix C, pp C-1 to C-26), and this Court's denial of an interlocutory petition for a writ of certiorari is reported at 488 U.S. 956. The second Court of Appeals' decision is reported at 945 F.2d 889 (7th Cir. 1991) (Easterbrook, dissenting) ("*Merk II*") (Appendix B, pp B-1 to B-34); the District Court opinions are reported at No. 85 C 7876 (N.D. Ill. April 27, 1990) (1990 WL 71027) (Posner, sitting by designation) (Appendix D, pp D-1 to D-20) and at 734 F.Supp. 330 (N.D. Ill. 1990) (Posner, sitting by designation) (Appendix E, pp. E-1 to E-5).

JURISDICTION

The judgment in *Merk I* was entered on May 31, 1988, and Jewel's timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on June 27, 1988. This Court denied an interlocutory petition for a writ of certiorari on November 14, 1988.[1]

The judgment in *Merk II* was entered on September 27, 1991. Jewel's timely Petition for Rehearing was denied on December 20, 1991, and on the same date its timely Suggestion for Rehearing In Banc was denied by a five to five vote. Petitioner invokes the jurisdiction of this Court under 28 U.S.C.S. § 1254(1) (Law. Coop 1988).

STATUTES INVOLVED

This case involves Sections 203(d) and 301(a) of the Labor Management Relations Act ("LMRA"), 29 U.S.C.S. 173(d), 185(a) (Law. Coop 1988); Sections 9(a) and 10(b) of the National Labor Relations Act ("NLRA"), 29 U.S.C.S. 159(a), 160(b) (Law. Coop 1988); and FED. R. CIV. P. 50. Appendix J, pp. J-1 to J-4, contains the texts of these statutes.

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[1] Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from a final judgment. Stern, Grossman, Shapiro, *Supreme Court Practice* 226 (6th Ed. 1986).

STATEMENT OF THE CASE

This case arose from the efforts of Jewel and Local 881 in January, 1983, to avoid a strike after their negotiations for a renewal collective bargaining agreement had deadlocked. At the eleventh hour, they reached an agreement which included several oral understandings that the parties, in accordance with their past practice and at the insistence of Local 881, agreed to omit from the written portion of their collective agreement.

The key oral understanding was that Jewel dropped its demand for a "most favored nation" clause (permitting a wage reduction by Jewel if the union agreed to lower wages for any of its competitors); in exchange, Local 881 agreed to an economic reopener (including the availability of the traditional economic weapons of strike and lockout) during the term of the three-year agreement, if a cut-rate competitor entered the Chicago market.

Local 881 insisted that the understanding about the reopener remain oral in order to avoid criticism from its International. (*See* App. D at 2-5). Without disclosing the reopener to its general membership,[2] Local 881 arranged for membership ratification of the new agreement and advised Jewel in March, 1983 that ratification had occurred.

Subsequently, the cut rate competitor entered the market, and Jewel invoked the reopener. After bargaining for seven sessions between December 15, 1983 and February 1, 1984, Local 881 suddenly denied having ever agreed to a reopener. Bargaining soon reached impasse. On February 24, 1984, after giving appropriate notice to the union, Jewel implemented its final wage cut proposal. Local 881 filed a written grievance on February 17, 1984, an unfair labor practice charge on February 22, 1984, and a breach of contract suit on February 23, 1984, seeking restitution of all pay cuts for all affected employees, including Respondents herein (who were employed by Jewel at that time). In June, 1985, Jewel and Local 881 agreed to both a new multi-year labor agreement and a settlement of all outstanding actions. Under that settlement, which was ratified by the Local 881 membership, Jewel paid all those still on the payroll on June

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[2] However, several bargaining unit members were part of the negotiating committee and were informed of the reopener. Stip. Uncon. Facts, ¶25

21, 1985, most — but not all — of the wages it had previously cut. That settlement did not provide for any payment to employees no longer working for Jewel, a group that included many individuals who were initially hired during the fourteen-month period between Jewel's wage cuts and the June 21, 1985 settlement. The NLRB approved that settlement, finding that it effectuated the purposes of the NLRA with respect to all the affected workers, including those who had left employment prior to settlement (that is, including the class of Plaintiffs in the instant case). *See* Appendix M at 4-6.

Thereafter, a former employee and a member of the Respondents' class filed two separate unfair labor practice charges: one challenging the settlement itself and another alleging that the Union had not fairly represented former employees in negotiating it. The NLRB's Regional Director dismissed them both.

On September 10, 1985, Respondents filed a "hybrid" suit under Section 301, LMRA, against Jewel for its alleged breach of contract and against Local 881 for its alleged breach of the duty of fair representation. Later, Respondents added a "straight" breach of contract count against Jewel. Judge Aspen, granting Local 881's motion for summary judgment, held that the Union had no duty of fair representation to former employees, and, consequently, that its settlement with Jewel could not have violated any duty to them. In an interlocutory appeal, the Seventh Circuit sustained both that holding [848 F.2d 761 (7th Cir. 1988)] and the holding of the District Court (which had applied Illinois' five-year statute for breach of an oral contract) that this action against Jewel had been timely. This Court denied certiorari, 488 U.S. 956 (1988).

A jury trial on the breach of contract claim resulted in a verdict and judgment for Jewel. Circuit Judge Posner, sitting by designation as the trial judge, denied Respondents' motion for judgment notwithstanding the verdict or for a new trial. A panel of the Seventh Circuit reversed that judgment (Easterbrook, J., dissenting). Jewel's Petition for Rehearing was denied by the panel on December 20, 1991. Jewel's Suggestion for Rehearing In Banc was denied on the same date by a 5-5 vote of the Seventh

Circuit judges. Judge Posner, whose decision as trial judge had been reversed by the panel, cast no vote on the Suggestion for Rehearing In Banc.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, INVALIDATING AN ORAL UNDERSTANDING THAT WAS AN INTEGRAL PART OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT, CONFLICTS WITH THIS COURT'S PRINCIPLES, AND WITH THE DECISIONS OF OTHER CIRCUITS AND OF THE NLRB, WHICH HONOR COLLECTIVE BARGAINING AGREEMENTS DESPITE DEFECTS IN RATIFICATION PROCEDURES

It is undisputed and indisputable that a collective agreement may properly include an understanding that, under specified conditions, the agreement could be reopened for negotiations and possible wage reductions mid-term.[3] Furthermore, the Court of Appeals properly recognized that the parol evidence rule, on which the Plaintiffs had relied, did not bar evidence regarding the oral reopener agreement. (945 F.2d at 893, App. B at 8) That court, however, in declining to permit proof of the oral reopener, reasoned that:

> collective bargaining agreements must be more secure than garden variety contracts. Accordingly, . . . *national labor policy* forbids introduction of prior or

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[3] *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). [Employer and Union have the power to make new and different contractual arrangements mid-term.] Thus, contrary to the Seventh Circuit's assertion in *Merk II*, 945 F.2d at 896, App. B at 12, that "Union members who reasonably believed that they were guaranteed a fixed rate of pay for the duration of the CBA unexpectedly found their wages slashed at mid-term," this Court's decisions have made it clear that any belief that a wage provided for in a written contract is immutable for the duration of that contract would not be reasonable.

> contemporaneous secret agreements to contradict fundamental terms of a ratified collective bargaining agreement.

Merk II, 945 F.2d at 894, App. B at 8-9 [Emphasis added].

The approach of the court below, which imposed more, rather than less, formality on the parties in collective bargaining perverts "national labor policy", as announced by this Court. Furthermore, by restricting the flexibility of unions and employers to deal creatively with difficult issues, the Seventh Circuit's approach significantly increases the risks of instability and bargaining impasses leading to strikes. As this Court observed long ago, the collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). The special nature of collective bargaining agreements means that they are not "governed by the same old common-law concepts" that control private contracts. *Transportation-Communication Employees Union v. Union Pacific Railroad*, 385 U.S. 157, 160-61 (1966). On the contrary, their interpretation *necessitates* consideration of other agreements, practice, usage and custom. *Id.*

By subjecting ratified labor agreements to stricter scrutiny than "garden variety contracts", the court below also rejects the standards adopted by other courts of appeal. Thus, the Third Circuit has ruled that "where a court is called on to interpret a collective bargaining agreement it is generally appropriate for the court to look beyond the face of the collective bargaining agreement." *Southern Pennsylvania Transportation Co. v. Brotherhood of Railroad Signalmen*, 882 F.2d 778, 784 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990). *See also International Union, United Mine Workers v. Racho Trucking Co.*, 897 F.2d 1248, 1254 (3d Cir. 1990).

The Fifth Circuit has similarly declared that "[f]ollowing the lead of the Supreme Court, this Circuit and others have refused to apply contract-law concepts, such as the parol evidence rule, to collective bargaining agreements." *Manville Forest Products Corp. v. United Paperworkers International Union*, 831 F.2d 72, 75 (5th Cir. 1987). The Ninth Circuit and the D.C. Circuit have

reached similar results.[4] Previously, even the Seventh Circuit had expressed the view that the parol evidence rule should not operate to defeat the intention of the parties in collective bargaining and should recognize supplementary understandings, oral and written. *See Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, 72 (7th Cir. 1983). In contrast, the decision below invokes a 1945 Sixth Circuit case which has "vanished without a trace" as a source of precedent. *Gatliff Coal Co. v. Cox*, 152 F.2d 52 (6th Cir. 1945), discussed in *Merk II* (Easterbrook, J. dissenting), 945 F.2d at 902, App. B. at 25-26.

In its treatment of the parol evidence rule, the court below departs from the views of this Court and various courts of appeals concerning both the flexibility essential for the bargaining process and the broad frame of reference that should inform the interpretation of collective agreements. The importance and prevalence of oral understandings, *See* A. Cox, et al., *Labor Law, Cases and Materials* 741 (11th Ed. 1991), and the intercircuit differences regarding the applicability of the parol evidence rule to collective bargaining agreements strongly support this Court's review of the decision below.

Even more deserving of this Court's scrutiny is the Seventh Circuit's announcement of a new rule of public policy controlling the terms of labor contracts. According to that rule, "national labor policy" forbids the enforcement of a "secret" term (*i.e.*, an oral term not disclosed during ratification), which affects a "fundamental term" of the collective bargaining agree-

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[4] The Ninth Circuit has held that "[i]n discerning intent, the court may look to evidence outside the four corners of the document, such as the circumstances and negotiations of the parties in making the contract." *Sepulveda v. Pacific Maritime Association*, 878 F.2d 1137, 1139 (9th Cir. 1989), *cert. denied*, 493 U.S. 1002 (1989). *See also IBEW Local 47 v. Southern California Edison Co.*, 880 F.2d 104, 107 (9th Cir. 1989) ("This circuit has noted that this general principle of contract law applies with even greater liberality in disputes regarding collective bargaining agreements.") *Accord, United Mine Workers of America 1950 Benefit Plan and Trust v. Bituminous Coal Operators Association*, 898 F.2d 177, 181 (D.C. Cir. 1990).

ment.[5] Under the banner of "national labor policy", the court also assumes the power to create and enforce a new agreement for the parties by simply erasing the key oral understanding that had paved the way for their overall agreement.

In nullifying the parties' own agreement, the decision violates the mandate of this Court in *United Paperworkers v. Misco*, 484 U.S. 29 (1987). *Misco* reaffirmed the principle that considerations of public policy may preclude enforcement of collective bargaining agreements *only* where the contract would violate:

> 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests'

Misco, 484 U.S. at 43, *citing W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757 (1983) and *Muschany v. U.S.*, 324 U.S. 49 (1945). The decision below fails to identify any specific law or precedent that is contravened by the reopener agreement or its nondisclosure.

By substituting an agreement of its own making, the court below also ignored this Court's repeated admonitions against ad hoc governmental interference with the private bargaining system that the NLRA was designed to foster and protect. *See H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). "[I]t was never intended that the Government would . . . step in, become a party to the negotiations and impose its own views of a desirable settlement." *Id.* at 103-04. *See also NLRB v. Insurance Agents*, 361 U.S. 477, 487-90 (1960).

The root of the Court of Appeals' willingness to disregard the basic presuppositions of our bargaining system appears to have been the mistaken notion that all written and significant provisions of a collective bargaining agreement are disclosed

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[5] The Seventh Circuit errs when it asserts that "[n]o one disputes that the oral reopener was, at the behest of Union officials, deliberately concealed from the union membership." 945 F.2d at 895, App. B at 11. The record [App. D at 2-5] showed that the local union wished to avoid revealing the reopener agreement to its International, that this goal could best be achieved by keeping the agreement oral, and that a number of bargaining unit members (those on the bargaining committee) were informed of the reopener.

during ratification. The misapprehension is evidenced by the court's use of emotionally charged terms such as "secret" in order to tie the oral nature of the reopener agreement to the union's failure to disclose it during ratification. But there is no guarantee that even a written contractual provision will be disclosed to the membership during ratification. Indeed, the union never gave employees copies of the written portion of the agreement for study before previous ratification votes. It simply provided its own summary of the points it deemed salient. *See Merk II*, 945 F.2d at 904-05, App. B at 30-31. Nor did the union's constitution prescribe the nature and extent of information to be provided before ratification. Congress might decide to require that bargaining unit members be provided perfect information prior to ratification, but Congress has not done so. *Merk II*, 945 F.2d at 900, App. B at 22-23 (dissenting opinion). The labor laws do not require unions to conduct any contract ratification at all, let alone prescribe the extent of required disclosure.

A recent Ninth Circuit decision displays a sharply different and more realistic view of the ratification process than that articulated by the Seventh Circuit. *Ackley v. Western Conference of Teamsters*, Nos. 90-55438, 90-55702 (9th Cir. February 21, 1992) (1992 WL 28993), Appendix O. In *Ackley*, two union members objected to the Teamsters' refusal to disclose any changes in non-economic terms of the collective bargaining agreement prior to ratification. The court declared:

> [u]nequal access to information is as inherent in the structure of the collective bargaining system as it is in our larger democratic system. [citations omitted] Union leaders, by virtue of their status as collective bargaining representatives, necessarily possess more information about the progress and projected outcome of collective bargaining than union members. At the time of a ratification vote, the officials will inevitably know more about the final terms of the new agreement than the rank-and-file members. This would be the case even were we to require advance distribution of the entire agreement. . . . To attempt to ensure equal information for negotiators and members alike would be wholly unrealistic [citation omitted]. . . .

Ackley, Nos. 90-55438, 90-55702, slip op. at 1764, App. O at 20. In contrast, the opinion below represents an attempt to bring about an equality of information for employees that is unattainable. *See Merk II*, 945 F.2d at 898, App. B. at 18.

The Ninth Circuit's *Ackley* opinion demonstrates clearly that interference with the collective bargaining process by decisions such as the one below, could be detrimental to unions, employers, and employees, for there is a tri-partite interest in the stability of labor-management agreements. Furthermore, judicial supervision of the details of the ratification process in an attempt to ensure equal information for negotiators and rank-and-file could easily subvert the union's statutory role as bargaining agent. *Ackley*, Nos. 90-55438, 90-55702 slip. op. at 1765, App. O at 21.

By obligating employers to monitor the ratification process and holding the validity of the contract hostage to that process, the decision below also conflicts with the National Labor Relations Board's long settled and firm view, a view which most other circuits have upheld. The NLRB has consistently held that an employer lacks standing to question whether a union's ratification procedure satisfied the union's constitution. "[I]t is for the Union, not the employer, to construe and apply its internal regulations relating to what would be sufficient to amount to ratification." *M&M Oldsmobile*, 156 NLRB 903, 905 (1966). Moreover, "as a matter of law, it is none of the Employer's business how (or even whether) the [union] obtains the employees' approval of the Employer's offer." *McLaughlin & Moran, Inc.*, 299 NLRB No. 7, 134 LRRM (BNA) 1217, 1218 (1990).

> To hold otherwise . . . would create the prospect of 'protracted litigation regarding the union's compliance with its own procedures', thereby encouraging industrial instability.

Beatrice/Hunt-Wesson, 302 NLRB No. 30, 137 LRRM (BNA) 1075, 1077 (1991), *citing M & M Oldsmobile, supra*.

The Board has been equally steadfast in its view that a union's failure to follow a self-imposed ratification requirement cannot affect the enforceability of the agreement. "Once union

representatives manifest final assent to a particular agreement, a binding contract is created. . . ." *Beatrice/Hunt-Wesson*, 137 LRRM (BNA) at 1076 (Stephens, concurring).[6] To be sure, employers, unions and dissident employees have sought to repudiate a ratified collective bargaining agreement on grounds of defective ratification. *See Id.* at n.1 ("The issue has arisen with some frequency"). But the NLRB has rejected such attacks on enforceability, refusing even to consider allegations that:

> the union's ratification procedures were not in accordance with the requirements of its constitution and by-laws, *Newtown Corp.*, [280 NLRB 350 (1986), *enf'd* 819 F.2d 677 (6th Cir. 1987)]; *North Country Motors*, [146 NLRB 671 (1964)], or that the ratification vote was tainted by procedural defects, *Martin J. Barry Co.*, [241 NLRB 1011 (1979)], or even that the union coerced its members into voting for ratification, *Utility Tree Service*, 218 NLRB 784 (1975), *enf'd* 539 F.2d 718 (9th Cir. 1976).

Mclaughlin & Moran, Inc., 134 LRRM (BNA) at 1219.

The Board has not permitted an employer to question the union's selection of the matters to be presented at ratification or the manner of presentation, much less required an employer to do so. The Board has been properly concerned that endless litigation or controversy about ratification details at contract termination, when no-strike clauses are generally ineffective, would obstruct agreement and frustrate the national interest in industrial peace.

Under this Court's ruling in *Textile Workers Union v. Lincoln Mills* 353 U.S. 448 (1957), the Court of Appeals should have given considerable weight to the NLRB's consistent decisions regarding ratification, decisions that have been upheld in the Fourth, Sixth,

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[6] *Cf. Beatrice/Hunt-Wesson, supra* 137 LRRM at 1079. [Employer may inquire into manner of ratification only where the union expressly waives "its right to define the terms of ratification and adequate compliance with them." (Stephens, concurring)]

Ninth and Eleventh Circuits.[7] *See also San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 242-3 (1959). The Seventh Circuit, however, discounted the Board decisions and the strong reasons that support their insulation of collective agreements from attacks based on defects in union-created ratification requirements.

The Seventh Circuit's view also ignores the realities of both the bargaining and ratification process. In bargaining, a union must reconcile a wide variety of divergent interests among the employees it represents:

> When the interests of several groups conflict, or future needs run contrary to present desires, or when the individual's claim endangers group interests, the union's function is to resolve the competition by reaching an accommodation or striking a balance. The process is political. It involves a melange of power, numerical strength, mutual aid, reason, prejudice, and emotion. . . .

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 24-25 (1958). Typically, in negotiations each side wins some points, loses others, and reaches compromise positions on still others. During ratification, a union is eager to present the total package to its membership in the most favorable light. As the "highlights" of a particular agreement are presented, the high points often outshine the low points, compromise may be depicted as victory, and unpalatable contingencies (like the reopener agreement) which may never ripen may not be mentioned at all.

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[7] *See e.g.*, Agreement enforced against employer despite ratification issues: *Williamshouse-Regency of Delaware, Inc.*, 297 NLRB No. 26 (1989), *Consumat Systems*, 273 NLRB 410 (1984); *Seneca Environmental Products*, 243 NLRB 624 (1979); *Mt. Airy Psychiatric Center*, 230 NLRB 668 (1977); *Hickory Farms of Ohio*, 222 NLRB 418 (1976), *enf'd*, 558 F.2d 526 (9th Cir. 1977); *C&W Lektra Bat Co.*, 209 NLRB 1038 (1974); *M&M Oldsmobile*, 156 NLRB 903 (1966); and NLRB cases cited *supra*. Agreement enforced against union despite ratification issues: *McLaughlin & Moran, Inc.*, 299 NLRB No. 7 (1990); *Teamsters Local 100 (Duro Paper Bag)*, 216 NLRB 1070 (1975), *enf'd.*, 532 F.2d (6th Cir. 1976), *cert. denied*, 429 U.S. 859 (1976); *Elevator Constructors Local 8 National Elevator*, 185 NLRB 769 (1970), *enf'd* 465 F.2d 974 (9th Cir. 1972). *See also Houchens Market of Elizabethtown, Inc. v. NLRB*, 375 F.2d 208 (6th Cir. 1967); *NLRB v. Darlington Veneer Co.*, 236 F.2d 85 (4th Cir. 1956).

Reality is that "[a] union may be willing to enter into an agreement that it believes is in the best, long-term collective interests of union members but that may not enjoy their immediate, widespread support." *Beatrice/Hunt-Wesson*, 137 LRRM at 1078 (Stephens, concurring), and that a union may, in good faith, adjust its ratification presentation accordingly. Challenges to ratification based on union constitutions or practices may involve not merely non-disclosure issues but a host of other issues such as: Was the membership given adequate time to study proposals, and then to debate them? Was there adequate disclosure of ambiguities and of matters relevant to their resolution, including informal understandings and past practices? *See Ackley*, Nos. 90-55438, 90-55702 slip op. at 1765, App. O at 22.

Whatever the merits of regulating such sensitive interaction between unions and their members, the Board and many courts of appeal have recognized that an employer is not the appropriate monitor. The Seventh Circuit has ignored these decisions and the strong reasons behind them. Instead, it has imposed unprecedented responsibilities on employers for union defects in the ratification process and has also imposed a novel and unwarranted sanction on the employers — destruction of their crucial contract rights. The Seventh Circuit's view cannot be reconciled with the view of the Ninth Circuit and the National Labor Relations Board.

II. THE COURT OF APPEALS' SELECTIVE AND UNWARRANTED NULLIFICATION OF THE ORAL CONTRACT PROVISIONS DIMINISHES THE NECESSARY FLEXIBILITY OF COLLECTIVE BARGAINING AGREEMENTS AND UNDERSCORES THE INTERCIRCUIT CONFLICTS CONCERNING THE PROPER REMEDIES FOR DEFECTIVE UNION RATIFICATION PROCEDURES

The Seventh Circuit's approach to allegations of defective ratification disregards the risks, pressures and realities of collective bargaining, as illustrated by this case. Jewel bargained for a most favored nations clause to protect its competitive position, but at the last minute, agreed with the union's proposed compromise of a conditional oral reopener. That reopener was

a crucial part of the parties' agreement. Furthermore, it did not by its own force contradict or change any of the conditions of employment; the consequences would depend on the market variables operative when and if the reopener was exercised. The employer, as Judge Easterbrook shows, might have sought to protect its competitive position through means other than the conditional reopener. 945 F.2d at 905, App. B at 32-33. The results of such hypothetical efforts cannot now be determined. What is, however, clear now is that by agreeing to the reopener, the parties avoided a strike, and thereby served the national, as well as their own, interest in industrial peace.

The Seventh Circuit's response to the attack on that reopener based on defects in the ratification process is destructive of both the flexibility necessary for effective bargaining and the stability of resulting agreements. To be sure, the court would apply its rule of nullification only if "substantial terms" or "fundamental terms" of the labor agreement had not been disclosed during ratification. But negotiators who seek to avoid a strike by creative compromises negotiated in an atmosphere of rush and crisis, should not be faced with the prospect that all or part of their agreement will be nullified if a court disagrees with their assessment of significance years later. See 945 F.2d at 905, App. B at 32. Similarly, the Seventh Circuit relies on a slippery and elusive notion of "benefit" in distinguishing "an unratified provision" of the 1969 collective bargaining agreement between these parties. The crucial difference, in the Seventh Circuit's view, was that the earlier unratified reopener "furthered the interest of all parties." 945 F.2d at 897, App. B at 14. There is no contention that the union did not believe that the 1983 strike-avoiding reopener would have the same effect.[8]

The calculus regarding "fundamental" and "benefits" that the Seventh Circuit would require of negotiators trying to avoid or to end a strike would breed considerable uncertainty — as that court's internal divisions made clear. For example, an employee who loses a job and all wages might well consider seniority even more fundamental than a reduction in wages. The

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[8] Viewed without benefit of hindsight, the 1969 reopener might just as well have resulted, not in an agreed upon wage increase but an impasse and a strike, with its attendant risks to the firm and its workers.

uncertainties inherent in the Seventh Circuit's approach threaten the flexibility and problem-solving capacity of collective bargaining, which frequently has made use of undisclosed and unratified oral and written side agreements for unimpeachable ends.

The basic approach of the Seventh Circuit is inconsistent with the approach of and the results reached by other courts of appeals. It is fundamentally at odds with the Ninth Circuit's approach in *Ackley, supra*. In *Ackley*, individual plaintiffs also began by suing their employer (among others) under Section 301, alleging that the union's non-disclosure of certain items during ratification had violated the provision of the union's constitution that required contract ratification. Plaintiffs relied on Section 301 of the LMRA and alleged, *inter alia*, a breach of the union's duty of fair representation, and sought rescission of the contract allegedly subject to defective ratification.[9] The plaintiffs failed, however, to assert liability against the union, under Section 301(a) of the LMRA, for the breach of the union's contractual obligations to its members under the provisions of the union constitution. It was that failure that the Ninth Circuit emphasized in affirming the district court's dismissal of the action. *Ackley*, Nos. 90-55438, 90-55702 slip op. at 1749, App. O at 5.

In sharp contrast to the approach of the Seventh Circuit, *Ackley* emphasized the following points:

First, the primary means for redressing a violation of a member's right to disclosure under a union constitution is an action under Section 301 against the union for breach of contract. *See generally, Woodell v. IBEW*, ___ U.S. ___, 112 S.Ct. 494 (1991). *See also Lewis v. IBT*, 826 F.2d 1310 (3d Cir. 1987)

Second, "Statements made by union representatives during the contract ratification process furnish insufficient justification for invalidating a collective bargaining agreement unless a showing is made that but for those statements, the ultimate

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[9] Later the *Ackley* plaintiffs agreed to the dismissal of the defendant-employer and abandoned their claim for rescission in favor of a claim for a declaratory judgment.

outcome of the bargaining would have been different."[10] *Ackley*, Nos. 90-55438, 90-55702 slip. op. at 1762, App. O at 18. The court, moreover, acknowledged that the burden of such proof was so heavy that, in practice, ratification defects would not lead to denial of enforcement of collective bargaining agreements.[11] *See also Acri v. IAM*, 781 F.2d 1393 (9th Cir. 1986) (concurring opinion), *cert. denied*, 479 U.S. 816 (1986).

Third, before union members bring a lawsuit alleging a deprivation of their entitlements under a union constitution, they must first exhaust their internal union remedies.

Fourth, in describing the federal remedial framework for redressing a union's violation of its members' rights under a union constitution, the Ninth Circuit did not even refer to a breach of contract action under Section 301 against an employer.

The fundamentally inconsistent approaches of the two circuits cannot be explained away on the ground that in *Ackley* it was not alleged that the employer had known of the union's nondisclosure plan. That difference would not explain the failure of the Seventh Circuit to apply the strict prerequisites for rescission of collective bargaining agreements imposed by the Ninth Circuit. Nor would it explain the Seventh Circuit's failure to insist on exhaustion of internal union remedies by a union member before asking a court to determine whether a union's ratification procedures violated its members' rights under the union's constitution.

Additional uncertainties result from other appellate decisions dealing with the possible impact of defects in ratification on enforceability of collective bargaining agreements. Although those decisions did not deny enforcement to any contractual

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[10] There is no testimony in the record to support the Court of Appeals' passing reference to the reopener in this case later being voted down. *Merk II*, 945 F.2d at 897, App. B at 16. No such vote was ever taken.

[11] Although the Ninth Circuit imposed this burden on plaintiff employees suing their union, rather than their employer, the plaintiffs should bear no lighter burden in a lawsuit against their employer, seeking rescission. The employer, after all, would have no disclosure obligation during the ratification process, under the union constitution or otherwise. On the contrary the employer's intrusion in that process might well constitute an unfair labor practice.

provision, they left such a possibility open. *See e.g., Chrysler Workers Ass'n v. Chrysler Corp.*, 834 F.2d 573, 582 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Central States SE and SW Areas v. Kraftco, Inc.*, 799 F.2d 1098, 1112 (6th Cir. 1986), *cert. denied*, 479 U.S 1086 (1987). In *Chrysler*, employees challenged unratified secret side letter agreements which eliminated important transfer rights. The Sixth Circuit declared: "[w]e find that Chrysler had a right to rely upon its agreement with the Union absent clear notice that the Union was acting in bad faith against the interests of its members." *Cf. Anderson v. United Paperworkers Int'l. Union*, 641 F.2d 574 (8th Cir. 1981); *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747 (3d Cir. 1977); *Deboles v. Trans World Airlines*, 552 F.2d 1005 (3d Cir. 1977), *cert. denied* 434 U.S. 837 (1977).

The district court in *Merk II* adopted the Sixth Circuit's formulation set forth in *Chrysler*. *Merk v. Jewel Food Stores*, No. 85 C 7876 (N.D.Ill. April 27, 1990), slip op. at 9, App. D at 9. The Seventh Circuit, sub silentio, rejected that formulation and thereby created another significant intercircuit difference impinging on important national values — private ordering of, and stability for, collective bargaining agreements.

Those values are also undermined by the Seventh Circuit's remedy: i.e., selective contract nullification. That remedy — unprecedented to our knowledge — erased a part of the agreement that the Seventh Circuit itself characterized as "fundamental" and that the district court properly found had paved the way for Jewel's agreement to a new contract. The Seventh Circuit did not even address the question of the divisibility of the agreement. Why, after the court invalidated the reopener, should the rest of the agreement be enforced against Jewel? *See generally*, 2 Farnsworth, *Contracts* 70 (1990), 3 Farnsworth, *Contracts* 50-51 (1990).

The Seventh Circuit's failure to address that question is related to its failure to consider the overall federal remedial framework for vindicating members' rights violated by their unions. Those failures resulted in an unjustified separation of culpability from liability. Thus, the Seventh Circuit concluded that nondisclosure of the oral understanding during ratification wronged the Respondents by denying them their rights under

the union constitution. If that nondisclosure was a wrong, Local 881, not the employer, devised and implemented it. By contrast, the employer had no duty to advise the union members regarding any of the terms, written or oral, of the collective agreement; nor did the employer have a right to participate in the ratification process. On the contrary, any attempts to do so would have undermined the union's status as the exclusive representative, and could have been treated as an unfair labor practice. *See, e.g., Teamsters, Local 281 v. McLaughlin & Moran*, 299 NLRB No. 7 (1990).

Plainly, Jewel was only a bystander with respect to any violation of Respondents' ratification rights while Local 881 had the paramount and exclusive responsibility under the union constitution and was the prime mover in any constitutional violation that occurred. Consequently, to exculpate Local 881 while subjecting Jewel to substantial liability would be manifestly unjust. Nonetheless, that is the perverse result of the course of this litigation.

That perverse result underscores the questions raised and approached so differently by *Ackley* and *Merk II*. What should be the primary federal remedy against alleged union breaches of duties to disclose when ratification of collective agreements is prescribed by the union constitution? What burdens should be imposed on those who would nullify collective agreements in whole or in part, on the basis of alleged default by the union of its duty to disclose during the ratification generally required by the union constitution? These questions implicate the basic values of the collective bargaining system and the appropriate distribution of responsibility between employers and unions for enforcement of union constitutions. We submit that the pertinent intercircuit differences regarding these questions warrant review by this Court.

III. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY BY OVERTURNING THE JURY'S VERDICT WITHOUT EXAMINING THE RECORD TO DETERMINE WHETHER NO REASONABLE JURY COULD HAVE REACHED THAT VERDICT

The Court of Appeals ignored this Court's established rules for reviewing the Plaintiffs' motion for a judgment notwithstand-

ing the verdict. Under the recent revision of Rule 50 of the Federal Rules of Civil Procedure, judgment may be entered contrary to a jury's verdict where "there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to [an] issue". Rule 50(a)(1), FRCP.[12] The reviewing court is not to evaluate the credibility of the witnesses, and all reasonable inferences are to be made in favor of the non-moving party. *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 696 (1962); *Brady v. Southern Railway Co.*, 320 U.S. 476, 479 (1943). The plaintiff who has lost the verdict is not entitled to judgment "unless no rational jury could have brought back a verdict" for the defendant. *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 678 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986).

The circuit court never inquired whether there was any evidentiary basis for the jury's finding that the reopener agreement was enforceable despite the union's failure to disclose it during ratification. Instead of considering this issue *de novo*, the Court of Appeals limited its analysis to attacking Judge Posner's opinion in the district court, in which he had refused on both legal and factual grounds to overturn the jury's verdict. (*Merk II* at 896-99, App. B at 12-19)

A proper review would have taken into account any alternative routes by which the jury could have properly reached the verdict it did, not just the route noted by the trial judge. *Iacurci v. Lummus Co.*, 387 U.S. 86 (1967). Under the instruction given (*See* Appendix N), the jury's verdict that the reopener agreement was enforceable could have been based on any one of the following findings of fact:

(1) The plaintiffs failed to prove that the general ratification provision in the union constitution actually required disclosure of agreements such as the reopener;

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[12] *Merk II* was decided prior to the effective date of the revision to Rule 50, but the legal standard at that time was the same. As the notes of the Advisory Committee state:

> Paragraph (a)(1) . . . effects no change in the existing standard. That existing standard was not expressed in the former rule, but was articulated in long-standing case law.

(2) The plaintiffs failed to prove that Jewel understood that the general ratification provision in the union constitution required disclosure of agreements such as the reopener; or

(3) Jewel was entitled to rely on a past practice of incomplete disclosure by the union during ratifications.

The court below had an obligation to consider each of these possibilities in testing the jury's verdict. Only if the trial record would support none of these possible jury findings would the court below have been justified in disregarding the jury's verdict. It should be noted that even under the legal standard announced by the Court of Appeals, a jury verdict based on finding (1) or (2) above would support the verdict in Jewel's favor.

The Court of Appeals failed to make the analysis required under the court's own legal standard or the standards of the trial court. Accordingly, the court below could not properly have found the evidence insufficient to support the jury's verdict. Consequently, its reversal of the judgment entered on that verdict is inconsistent with the settled principles under Rule 50 of the Federal Rules of Civil Procedure and deprives Petitioner of its right to jury trial. *Cf. Neely v. Eby Construction Co.*, 386 U.S. 317 (1967).

Accordingly, even if this Court were to decide not to disturb the legal analysis underlying the decision below, this Court should order the court of appeals to analyze the evidence, giving proper deference to the jury's role. If the court of appeals finds that the jury was asked to consider the wrong questions, then it should order a new trial so a jury can consider the factual issues in the correct legal context.

IV. THE DECISION BELOW THAT A UNION DOES NOT OWE A DUTY OF FAIR REPRESENTATION TO FORMER EMPLOYEES AND CANNOT BIND THEM BY A GRIEVANCE SETTLEMENT IS A DESTABILIZING DEPARTURE FROM THIS COURT'S DECISIONS

Local 881, pursuant to its authority under Section 9(a) of the NLRA, agreed to a grievance and arbitration procedure which

granted to the Union the sole authority to process, settle, and arbitrate grievances arising out of the collective bargaining agreement. *See* Appendix K, pp. 2-4. That authority continued regardless of whether a grievant's employment with Jewel ended prior to the resolution of his grievance. *See Pennsylvania Railroad Co. v. Day*, 360 U.S. 548 (1959). The corollary of the union's continued authority was its continued duty of fair representation to former employees whose grievances had arisen under the agreement.[13]

Nonetheless, the Court of Appeals in *Merk I* affirmed the district court's finding that the union had no duty to represent Respondents once their employment with Jewel ended. That court reached the wrong result because it began with the wrong question; *i.e.*, whether the Respondents were "statutory employees"[14] when the Petitioner and the Union settled their grievances. The right question was whether Respondents' grievances, at the time they arose, were subject to the exclusive

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[13] *See Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R. Co.*, 392 U.S. 192, 202 (1944) (the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power on their interest and behalf); *A.F.G.E. v. F.L.R.A.*, 812 F.2d 1326, 1328 (10th Cir. 1987) ("Fair representation means that when union uses a power which it alone can wield it must do so for the benefit of all"); *Bowen v. United States Postage Service*, 459 U.S. 212, 225 n. 14 (1983).

[14] The court below, because it ignored the context and reasoning of *Allied Chemical v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), concluded that that decision mandated the holding that the union did not represent former employees. *Pittsburgh Plate*, however, contains neither that sweeping declaration nor the mandate that the court below found in it. Rather, *Pittsburgh Plate* dealt with whether an employer had violated its duty to bargain by unilaterally offering retirees an opportunity to improve their collectively bargained health care benefits. In that context, this Court held that the retirees were not "statutory employees."

Respondents' status as "statutory employees" when their claims were settled is irrelevant here because their claims arose during their employment and, hence, were clearly governed by the grievance and arbitration procedures of the collective bargaining agreement. *Air Line Pilots Assoc. Intern'l. v. Alaska Airlines*, 735 F.2d 328 (9th Cir. 1984). Furthermore, even if Respondents' status as statutory employees were at issue, this Court has previously interpreted the much narrower definition of "employee" under the Railway Labor Act to include workers who have left their employment after initiating a claim for compensation for work performed on active duty. *Day*, 360 U.S. at 551-52

grievance and arbitration machinery established pursuant to the collective bargaining agreement. Plainly, the answer to that question is yes. There is no dispute in this case that Respondents were active employees when their grievances arose, subject to the contractually prescribed grievance arbitration procedure. Furthermore, Respondents' claims were, in fact, covered by the grievance filed by Local 881. *See* Appendix L.

Respondents' rights and duties under the grievance-arbitration process were not diminished merely because their employment with Jewel had ended. Hence, the claims of former employees — like those of Jewel's continuing employees — were subject to final resolution in the grievance-arbitration process. *See Day*, 360 U.S. at 551-553. Similarly, a former employee was required to exhaust contractual remedies before filing suit on a grievance that arose during his active employment. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53, 658-59 (1965).

Both former and present employees are protected by the duty of fair representation with respect to the final resolution of grievances arising during their employment. Absent a breach of the union's duty of fair representation, a union's final disposition of such grievances, whether through pre-arbitration settlement or arbitration, binds former employees to the same extent as current ones. *See Hines v. Anchor Motor Freight*, 424 U.S. 567, 570-72 (1976).

The Court of Appeals acknowledged, but failed to apply, the foregoing principles because it concluded that the former employees had not "assented" to Local 881's continued representation. *Merk I*, 848 F.2d at 766, App. A at 11. However, any such requirement of assent as a condition of Local 881's exclusive authority and its correlative duty to deal fairly with grievances would be wholly incompatible with this Court's settled position that former employees must exhaust their contractual remedies before bringing a lawsuit.

Furthermore, as this Court has long recognized, regardless of whether the grievants are current or former employees, resolving grievances through mandatory grievance procedures protects strong values central to the bargaining process. *See Day*, 360 U.S. at 551-53. *Cf. Republic Steel*, 379 U.S. at 656-59. Indeed,

in *Day*, this Court decried the destabilizing results of creating two classes of grievants: the first, current employees who would be subject to the grievance-arbitration process and the exhaustion requirement; and the second, former employees who could freely bypass such processes and file individual court actions. This division invites the unrest and instability caused by inconsistent disposition of claims. *Day*, 360 U.S. at 551-52. Consequently, overlapping arbitral and judicial remedies for grievances arising under the same collective agreement are incompatible with the central importance accorded to the parties' dispute-settling mechanisms by this Court's decisions in the "Steelworkers' Trilogy" (*United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960)), and which this Court reaffirmed in *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986).

Under *Day*, Local 881's duty of fair representation extended to the former employees. However, even if the union had been free to abandon such representation with respect to former employees, Local 881 did not do so here. On the contrary, it continued to represent former as well as current employees. Indeed, it negotiated the settlement with Jewel on the understanding that that settlement resolved all grievances, including Respondents'. The NLRB dismissed the Union's unfair labor practice charge against Jewel on the same basis. *See* Appendix M at 4-6. Under all those circumstances, the concomitant of the Union's continued representation of former as well as current employees was its duty of fair representation to members of both groups.

The court below erred in its failure to find that the union's duty of fair representation resulted from its assumption of authority to act for all the affected employees. That court concluded — erroneously, we submit — that the union lacked representative authority over the Respondents' grievances. Petitioner submits that such authority clearly existed but, in any event, the existence of a union's authority to act is not a necessary condition for activating its duty of fair representation.

Once the union undertakes the representation of workers, the duty arises. Indeed, the Third Circuit[15] has so held, and the Seventh Circuit's disregard of that principle brings it into conflict with that circuit. Respondents' recourse, if any, was not to question the Local's authority to settle grievances, but to urge that the terms agreed to by the union violated its duty of fair representation. The Court of Appeals below erroneously dismissed a claim alleging precisely such a violation because of its constricted and dysfunctional view of the scope of the duty of fair representation.

Even the Court of Appeals acknowledged the destabilizing effects of its decision, observing that "the proliferation of persons with authority to bargain on their own [as a result of its decision] will raise the cost of bringing the dispute to a conclusion . . . and the prospect of some ex-employees' suing and winning may make a union leery of compromising the claims of current employees." *Merk I*, 848 F.2d at 767, App. A at 12. Obviously, that prospect might also make an employer "leery" of putting its best offer forward if, after a settlement, former employees are free to seek more by litigation. Furthermore, such litigation, because it is controlled by persons without a stake in the relational interests safeguarded by grievance arbitration, poses substantial risks to those interests.

Under the Seventh Circuit's view, an arbitration award would presumably be no more final and binding on former employees than a settlement with the employer. If the union does not have the authority to represent former employees, and no corresponding duty to represent them fairly, an arbitration award would be no more binding on employees who ended their employment after the grievance arose and before the award was

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[15] *Koshatka v. Philadelphia Newspaper, Inc.*, 762 F.2d 329, 335 (3d Cir. 1985).

issued than would a pre-arbitration settlement.[16]

The unfortunate and significant consequences of the approach in *Merk I* are likely to arise frequently. Many disputes over the application of a collective bargaining agreement to particular employees are not resolved until after some of them have ceased their employment. Illustrative disputes are those over severance pay, health care provisions, sick leave, vacation, or seniority.

The decision in *Merk I* not only undermines the exclusivity of the grievance-arbitration machinery but it also places under a legal cloud established means of settling disputes over the terms of new agreements. For example, in negotiating renewal agreements, the parties frequently agree to pay increases, retroactive to the expiration of the prior agreement. Typically, such agreements grant such pay only to those working at the time of the settlement, thereby excluding former employees. *See, e.g., Larson v. Transit Authority*, 219 Neb. 539, 541, 364 N.W.2d 33, 36 (1985). *See also Buchholz v. Swift*, 609 F.2d 317, 325-27 (8th Cir. 1979), *cert. denied*, 444 U.S. 1018 (1980) (upholding vacation pay settlement granting vacation pay only to employees employed on a certain date and excluding any payments to former employees). Such retroactive adjustments for current employees implicate the same concerns as did the settlement reached in this case.

By holding that the union had no duty of fair representation to former employees, the Seventh Circuit ignored clear and controlling precedent of this Court. By also holding that the union had not assumed a duty of fair representation by its actions, regardless of its legal authority to act, the Seventh Circuit is in conflict with other circuits. The destabilizing results of this

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[16] Apparently, the Court of Appeals accepted the "unsettling conclusion" of *Merk I* because of what Petitioner submits was a misunderstanding of its own litigation position. Contrary to the Court of Appeals' conclusion, Petitioner in *Merk I* asserted that Respondents had assented to representation by Local 881 by: (1) accepting employment at Jewel; and (2) allowing the underlying grievance to be filed and processed on their behalf by Local 881 up through and including settlement without any objection. Under this Court's decision in *Day* and *Maddox*, no further action by either Respondent or Local was needed to activate the union's authority and its concomitant duty of fair representation.

decision on labor relations and the intercircuit conflict it creates warrant review by this Court.

V. THE COURT OF APPEALS' CHOICE OF A 5-YEAR STATUTE OF LIMITATIONS FOR THIS CLAIM UNDERMINES THE NATIONAL LABOR POLICY IDENTIFIED BY THIS COURT IN *DEL COSTELLO*

The district court found that the instant action was timely under the Illinois five-year statute of limitations for breach of oral contract actions. 641 F. Supp. at 1036, App. C at 16. The Seventh Circuit in *Merk I* ruled that whatever the appropriate limitations period should be, it was longer than the six-month Section 10(b) period advocated by Petitioner. 848 F.2d at 762 n. 2, App. A at 3. That ruling is, however, contrary to the teaching of *Del Costello v. IBT*, 462 U.S. 151 (1983); it also illustrates the need for this Court to clarify the scope of the *Del Costello* principles, given that a decade of ad hoc adjudication by lower courts has produced disagreement and disarray.

Del Costello requires the court to analyze the nature of a Section 301 claim in order to determine the appropriate statute of limitations. If the claim amounts to a "straightforward" breach of a collective bargaining agreement, then it is most appropriate to borrow the most analogous state statute of limitations. *Del Costello, supra*, 462 U.S. at 162, *citing Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). On the other hand, where a claim involves "those consensual processes that federal labor law is chiefly designed to promote — the formation of the collective bargaining agreement and the private settlement of disputes under it," then the need for uniformity and the need to maintain proper balance between stable bargaining relationships and finality of settlements and the interests of individual employees mandate the adoption of the six-month Section 10(b) limitations period. *Del Costello, supra* 462 U.S. at 171, *quoting Hoosier Cardinal, supra.*

The courts below erred by treating the dispute here as a "straightforward" breach of contract claim. In essence, this case has been an attack on the negotiation process used by the parties in 1983 to achieve a collective bargaining agreement and an attempt to alter that agreement by striking out the oral reopener.

The specific contention underlying that attack is that, in agreeing to the oral reopener and the overall collective agreement, the parties also agreed to keep the reopener "secret". Accordingly, this is not an action to redress a simple breach of contract; rather, it is a direct attack on the consensual bargaining processes that this Court in *Del Costello* sought to protect against belated attacks by adopting a uniform, national, six-month limitations period rather than permitting courts to borrow varying and sometimes lengthier analogous state statutes.

The reopener agreement was reached in 1983. The plaintiffs had reason to know of its existence, at the latest, in February, 1984, when Jewel reduced wages, claiming entitlement under the reopener agreement. Plaintiffs did not institute legal action until September 1985, more than two years after the challenged agreement had been reached, and after the end of the collective bargaining agreement's term. Even if Local 881's vigorous litigation on plaintiffs' behalf protesting the wage reductions tolled the running of the six-month period temporarily, it must have resumed running as plaintiffs quit the bargaining unit during the ensuing fourteen months. To permit so fundamental a challenge to the consensual bargaining process to gestate for five years or more would be "simply too long to allow industrial disputes to fester." *UFCW, Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340, 1348 (7th Cir. 1991), *quoting Associated Brick Mason Contractors v. Harrington*, 820 F.2d 31, 37 (2d Cir. 1987).

Almost ten years after *Del Costello*, lower courts are still groping toward a coherent analytical framework for determining the proper limitations period for Section 301 actions. In *Merk I*, the Seventh Circuit borrowed a state five-year statute of limitations. On the other hand, in *Lewis v. International Brotherhood of Teamsters Local Union No. 771*, 826 F.2d 1310 (3d Cir. 1987), the Third Circuit felt obliged to adopt the six-month section 10(b) period in a case which implicated precisely the same fundamental bargaining interests as does the case at bar. *Lewis* was a suit by a union member against his local union for violating the international's constitution by failing to submit for membership vote an agreement allowing the employer to institute an absentee policy. The member argued for a four-year

state breach of contract limitations period, but the Third Circuit ruled that there was a sufficient "family resemblance" between the claim in *Lewis* (that the local had failed to protect the members' right to vote on local supplements) and the claim in *Del Costello*. The Court explained that "the heart of Lewis' claim is his disagreement with Local 771's acceptance of the absentee policy. This implicates the adequacy of the Local's representation of the members' interest with respect to the policy and may directly affect the bargaining relationship with the employer." *Id.* at 1316. That the period of repose for such similar challenges to the parties' collective bargaining actions can be six months in the Third Circuit and five years in the Seventh Circuit offends national labor policy.

Because of the national interests involved, challenges to the negotiation process should be subject to the same federal statute of limitations regardless of the nature of the challenge to contract formation. Failure so to direct will only increase the uncertainty wrought by the opinion of the court below. Labor stability will be jeopardized if labor agreements are subject to complete or partial nullification throughout, and even after, their term by one or many employees dissatisfied with the ratification process.

CONCLUSION

For all of the reasons set forth herein, Petitioner respectfully requests that review be granted on the Questions Presented at the outset of this Petition.

Respectfully submitted,

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